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IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

Reply Brief of Petitioners on Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

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ing blow would be "relatively severe." (Appellee's Appendix No. 7604, pp. 401, 402, 403.)

By referring to such a collision as "imaginary," the Highway Department's brief neatly overlooks the fact that the violation of the Secretary of War's permit in raising the Bascule spans to only 71 degrees instead of 82 degrees put the "negligent" vessel on a collision course with the draw span. The Highway Department implies that the draw may be diminished and obstructed *above* the water line with impunity so long as the "clear" area between fenders *at* the water line is left mathematically open for the passage of the vessel through the draw.

From the outset of this case we have never contended that the FORT FETTERMAN may with impunity run into a structure across a navigable stream merely because such movable spans exist in violation of law. However, we do contend that the ship has a right to expect that a structure across a navigable stream has been constructed and will be maintained in accordance with law. If the vessel is to be held to strict accountability for its navigation, the bridge must also be held accountable. Every part of any bridge constructed across a navigable stream which is not constructed and maintained in strict conformity with the provisions of an Act of Congress and in strict accordance with permission granted by the statutory officials is an unlawful obstruction to navigation, the right of navigation being paramount, and the bridge owner is responsible for the consequences of a collision with it, unless the bridgeowner can show unequivocally that its noncompliance could not possibly have contributed to the disaster. *United States* v. *Norfolk-Berkeley Bridge Corp.*, 20 F. 2d 115. As this Court observed in *The Pennsylvania*, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, "Such a rule is necessary to enforce the mandate of the statute."

the ultimate conclusion, whether on the whole record the bridgeowner's violations of law could not, with reasonable possibility, have contributed to the disaster, is a question of law since only by application of the proper legal standards can the conclusion necessitated by the rule be properly drawn. It is well settled that causative negligence or the ultimate finding as to liability-creating fault is but a legal inference from other facts and is subject to review. *The E. A. Packer*, 140 U. S. 360, 35 L. Ed. 453; *Verbeeck v. Black Diamond Steamship Co.*, 2nd Cir., 1959, 269 F. 2d 68, 70.

The brief of the Respondent in opposition to the Petition for writ of certiorari is replete with extravagant assertions as to the proof for the establishment of so-called "facts." It is not our purpose to burden this reply brief with a clarification of every item of speculation which the Respondent labels a "fact," but we do feel that we should point out to the Court the factual distortions affecting the legal determinations which this Court is asked to review.

ARGUMENT

I. The Courts below have misapplied The Pennsylvania rule in concluding that the Highway Department has borne the burden of establishing that its statutory violation could not have contributed to the disaster.

Essentially it seems to be the contention of the Highway Department that since the District Court "found" that the statutory violation resulting from the failure to lift the bascule span to the required height could not possibly have caused or contributed to the collision and consequent damages that "fact" has been established and may not be reviewed on appeal. It has been stated by the Highway Department that we have contended that a statutory violation im-

poses upon the violator absolute liability, whereas the correct legal principle is that a statutory violation merely creates a presumption that the violation was causally connected with the disaster. The Highway Department then contends that since the presumption may be rebutted by the factual establishment of lack of causal connection between the disaster and the violation, this "fact" is to be determined by the preponderance of the evidence and, when so determined by the trial court, must be accepted on appeal unless found to be clearly erroneous.

We have never contended that a statutory violation creates absolute liability to the violator, but we do not agree that the violation creates merely a presumption of causal connection which may be rebutted by a preponderance of evidence to the contrary. If this is not so, then the burden imposed by the *Pennsylvania* rule upon a statutory violator would be to establish that the violation *probably* had no causal connection with the disaster and would not be to establish that the violation *could not possibly* have contributed to the same. The statement of the rule by this Court in *The Pennsylvania v. Troop*, 19 Wall. 125, 86 U. S. 127, 22 L. Ed. 148, is rendered meaningless by the conception of its application asserted by the Highway Department.

We believe that the *Pennsylvania* rule requires the statutory violator to show by clear, convincing and unequivocal evidence that the violation could not, with any reasonable possibility, have been causally related in any degree to the disaster. So long as there remains a reasonable doubt from evidence in the record as to whether the violation may have contributed to the disaster, then the burden has not been borne by the violator and the statutory fault is presumed to have contributed to the disaster. The establishment of the

ultimate fact in relation to this question differs from that required in the ordinary tort case, in that subsidiary facts which might ordinarily be sufficient to support a factual finding of causation in a negligence action would not be sufficient to satisfy the burden imposed in admiralty upon a statutory violator to establish lack of causation of the violation. This proposition is well stated by Judge Learned Hand in *Merritt-Chapman & Scott Corp. v. Cornell Steamship Co.*, 265 F. 2d 737, 739, when he states as follows:

> Ordinarily we should accept the judge's finding that the failure to set sufficient lights "did not in fact cause the accident," but a different rule applies to the breach of a statutory duty from the breach of an ordinary duty. The doctrine of The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148, is that when the fault consists in the breach of a "statutory" rule intended to prevent collisions * * * the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." This doctrine or its equivalent—concerning the absence of a lookout—we have applied in many decisions (Cramp cases). It seems to us impossible to be sure beyond reasonable doubt that if the lights had been visible for 6000 feet, the "Lion" would nevertheless have failed to act in season, especially when it needed so little added time to clear the "icebreaker".
>
> The decree will be modified to award the libellant only half damages.

The Highway Department contends that since there was "credible evidence" to support the District Court's finding that the admitted statutory violation resulting from raising the bascule span to 71 degrees rather than to the permit re-

quirement of 82 degrees was not causally connected with the collision, the appellate Court may not go behind the finding to impose the "harsh" requirement of *The Pennsylvania* rule. The so-called credible evidence was, so it is said, that a blow to the gear rack "caused" the span to begin to sag before it collided with the vessel's superstructure. So it is reasoned that the collision between the superstructure and the span would have occurred if the span had been mutually raised to 82 degrees rather than to 71 degrees. In this way there is eliminated from consideration, as a causative effect upon the disaster, the collision, which unquestionably occurred, between the vessel's superstructure and the span. This is the same illogic which this Court disposed of in *The Pennsylvania*, supra, when querying whether the collision would have *not* occurred "if the bark had obeyed the navigation regulations.":

> If it be said this is speculation, it may be admitted; but it is a speculation rendered necessary by a certain fault of the bark. It is equally speculative to conclude that the collision would have taken place if a fog-horn had been used instead of a bell, *and infer therefrom* that the fault of the bark had no relation to the disaster. ** (Emphasis added)

Proctors for the Highway Department contend that "when facts appear, presumptions recede", and they repeatedly state in their brief as if the Petitioners' case is merely predicated on a naked presumption. That is not the case. The evidence cited in the record establishes reasonably the violations, in relation to the disaster. That being the case, it cannot be concluded beyond reasonable doubt that the violations had no relation to the disaster.

From the outset it has been the theory of the H

standing on the bridge when the collision occurred said that the vessel bounced or rebounded or veered off after it collided, but none of these witnesses attempt to say that this rebounding occurred in the 4-second interval between the blow to the gear rack and the striking of the span by the vessel's midship house or superstructure. Undoubtedly there was a movement of the vessel away from the fender after the collision, as shown by the photographs identified as "C" and "D" in the appendix to our Petition, but to infer that this movement occurred prior to the collision between the span and the vessel's superstructure is pure speculation without evidenciary support. Furthermore, no witness attempted to give an admeasurement of the extent of the rebounding and none suggested that the vessel was out of contact with the fender prior to the collision between the span and the vessel's superstructure. Without such supporting testimony, the proctors for the Highway Department posed a question to their engineer witness LeTellier which assumed that immediately upon striking the gear rack the ship rebounded "until the ship reached a position which was adjacent to the face of the fender, with the fashion plate of the ship opposite to the position of the downstream girder and rack" and then asked whether there could have been contact between the downstream girder and the fashion plate unless the span had fallen from its original elevation of 71 degrees, to which the witness, of course, replied that it could not have done so (Appellee's Appendix No. 7604, pp. 220-221).

As stated above, several of the members of the ship's personnel testified that there was no sagging of the span until it was struck by the ship's superstructure, and this testimony is supported by the testimony of the Highway Department witness, Colonel Hawkins, to the same effect (Appendix of Appellants No. 7604, pp. 65, 66). Miss Hughes, in saying

that the span crumpled when the hull of the ship hit the "concrete part", makes it clear that from where she was standing this was merely an assumption because she could not actually see the contact at all and, particularly, she did not see any collision between the superstructure and the span (Appendix of Appellee No. 7604, pp. 116, 117, 118). Mrs. Rones stated that the first contact occurred before the superstructure entered the opening, but she does not attempt to say that the span collapsed as the result of this first blow and emphasizes that the span did not immediately start to fall (Appendix of Appellee No. 7604, p. 125). Mr. Gasque was in a row boat with the photographer who snapped the pictures of the collision, and stated that he could not see the lower part of the span and that the span started to fall after it struck the ship's bridge (Appendix of Appellants No. 7604, pp. 60 and 61). Commander Engler (some 900 to 950 yards from the collision) could not see the port side of the vessel when the collision occurred and said that the only part of the collision that he could see "was that the platform of the bridge, the draw bridge—well, it peeled the port side of the ship's bridge as it came past"; whether there was any other contact, he could not say (Appendix of Appellants' Reply Brief No. 7604, pp. 12-a, 13-a).

The physical facts, even more than the eye-witness accounts, clearly negative the contention of the Highway Department that the span was in a sagging condition before it struck the ship's superstructure. A photograph of the damage to the midship house or superstructure taken from the forward part of the ship (Defendant's Exhibit DX-4, shown as "A" in back of this brief) shows clearly the angle at which the object stood which struck the midship house and its fashion plate. The engineer witness Grushky testified that he was able to measure and compute mathematically the angle at which

the object stood and that this angle was 71 degrees (Appellants' Appendix No. 7604, p. 276). It is significant that there is not one word of testimony in the entire record to refute this statement by Mr. Grushky, or the accuracy of his trigonometry. It might also be said that it is equally apparent from this photograph that if the span had been at an angle of approximately 55 degrees, there would appear upon the superstructure a damaged area extending very nearly to the wheelhouse amidships (i.e., center of the ship's bridge), whereas the damaged area is confined to the extreme port corner of the ship's bridge, which was carried away. Moreover, the testimony is that, with the vessel breasting against the fenders, the rivets and girder of the overhanging bascule at 71 degrees would contact the fashion plate of the midshiphouse and cause the marks thereon shown by this photograph (Appellants' Appendix No. 7604, pp. 270, 276).

The experts for the Highway Department who testified that a blow to the gear rack caused the collapse of the bascule span stated that this conclusion was founded upon the evidence that the flange of the girder opposite the gear rack buckled on one side and tore upon the opposite side (Appendix of Appellee No. 7604, pp. 212, 213, 240, 241, 242). What these experts overlooked was the fact that the girder at this point buckled from compression on the upstream side and tore from tension on the downstream side (Defendants' Exhibit D-U and Appendix of Appellants No. 7604, pp. 264, 265). The uncontradicted testimony of the engineer witness Grushky is that if the blow which caused the collapse had come at a point opposite the gear rack, the flange of the girder at that point would have buckled from compression on the downstream side and would have torn from tension on the upstream side, whereas if the blow which caused the collapse had occurred at a point higher up on the girder

(such as the collision with the ship's superstructure) the collapse of the upper portion of the girder which followed would press down the lower portion of the flange, causing it to buckle in an upstream direction and to tear in a downstream direction (Appellants' Appendix No. 7604, pp. 265, 266, 267, 268, 269). Mr. Arthur Collard, also an experienced civil engineer engaged in designing and building bridges for many years, corroborated Mr. Grushky. (Appellants' Appendix, No. 8023, p. 116). Since the flange of the girder opposite the gear rack did buckle in an upstream direction and did tear in a downstream direction, this physical fact is enough to establish the possibility, if not the probability, that the blow from the illegally positioned bascule span upon the ship's superstructure caused or contributed to the damage, especially when the Highway Departments' engineers could cite no fact inconsistent with the possibility.

Eloquent evidence that the contact with the gear rack did not cause the collapse of the girder comes from the photograph identified as "C" in our Petition. This exhibit is a photograph of the collapsing bascule span just before it cleared the stern of the ship, and shows that the lower part of the downstream girder of the span is still standing at its original angle of elevation up to a point about opposite the ship's bridge decks, and is broken and bent at that point. Photograph "D" shows the jackknifing upper portion of the span which pressed the lower flange down and upstream, causing it to buckle on the upstream side and tear on the downstream side. The sequence photographs dramatically depict the events.

With all this evidence before the Court, how can it be concluded that the collision of the ship's superstructure with the bascule span, illegally placed at 71 degrees instead of 82 degrees where no such collision would have been possi-

ble, could not possibly have contributed to the collapse of the span? Even assuming that all of the evidence on the subject may be considered as establishing some credible basis for the theory advanced by the Highway Department, there has not been eliminated the reasonable possibility that the second collision (i.e., the collision of the ship's superstructure with the overhanging span) could have contributed to the collapse of the span and consequent damage. If, instead of the finding that it did make as to the proximate cause of the damages, the District Court had found, upon the same evidence, that the proximate cause of the damages was not the initial impact but the second collision, could the appellate Courts have said that such a finding was clearly erroneous? We believe that the entire evidence clearly supplies a rational basis for finding that the proximate cause of the damages was the second collision and, if that is so, it must inevitably follow that the evidence requires a finding that there exists a reasonable possibility that the second collision could have contributed to the damages.

It is suggested in the brief of the Highway Department that this Court will not review a "finding of fact" which has been adopted by two lower Courts. We are not unaware that this Court has on numerous occasions expressed itself to that effect and we believe that it did so for the first time, in an admiralty case, in 1868 (The Hippodame v. Chapin, 6 Wall. 216, 18 L. Ed. 794). In 1874, six years after its decision in *The Hippodame*, this Court decided *The Pennsylvania v. Troop*, supra, and in doing so, reversed the decree of the District Court (concurred in by the Circuit Court, which held *The Pennsylvania* solely at fault), despite the adoption of a factual finding by both the lower Courts that the statutory violation of the *Troop* was not a proximate cause of the collision. The Court there examined the evidence in order to determine for

itself whether the record sustained the burden imposed upon a statutory violator of establishing that its fault could not possibly have contributed to the disaster. Exactly the same situation is here presented and we believe that this Court should correct the misapplication of the *Pennsylvania* rule by the District Court in deciding this matter and by the Court of Appeals in its affirmance.

2. The protrusion of the gear racks into the draw opening was a statutory violation.

In support of our Petition we have previously argued that the construction of the Ashley River Bridge with the gear racks protruding 18 inches from the abutments into the draw opening constituted a statutory violation. We have contended that this statutory violation results from the fact that the particular feature was not in accord with the plans approved by the Secretary of War, and that the requirements of the Rivers and Harbors Appropriation Act of March 3, 1899 (33 U. S. C., Sec. 401) specifically makes unlawful the construction of any bridge until plans for the same have been approved by the Secretary of War, and further makes unlawful any construction which deviates from the plans after approval unless the same is submitted to and approved by the Secretary of War. The Highway Department concedes that the feature did not appear upon the plans approved by the Secretary of War but contends that it was not necessary to obtain approval of this feature, although no Court decisions or statutory provisions are cited in support of its contention.

Perhaps the viewpoint of the Highway Department as to its responsibilities is well indicated by the anecdote sarcastically recited on page 4 of its brief concerning the attitude of a Turkish Pasha in regard to the liability of the people of Samos. The Highway Department seems to feel that our

claim is the same as that of the Turkish Pasha, while its bridge is likened to the Island of Samos. This comparison overlooks the legal distinction between natural and artificial obstructions in waterways. Natural obstructions in waterways require no permission for their existence while man-made obstructions exist illegally unless specifically and affirmatively allowed by the Sovereign having jurisdiction over the waterway. We think that the position of the Turkish Pasha may well have been correct if the Island of Samos had been placed by the South Carolina State Highway Department in the Ashley River without any more permission from the Secretary of War than was obtained for the construction of the gear racks protruding from the abutments into the draw opening of the Ashley River Bridge.

Other references of the Highway Department indicate its conception that approval by the statutory authority for the construction of a bridge is a matter of mere form and carries no particular consequence in relation to the bridge's construction in whatever manner the Highway Department may desire. One such indication is to be gathered from the contemptuous reference (on page 31 of the Highway Department's brief) to the drawings which were attached to the permit issued by the Secretary of War as a "sketch which constituted the so-called 'plans' required by Section 401". Another indication, typical of the Highway Department's philosophy on this subject, appears in the testimony of its Chief Bridge Engineer, W. J. Gooding (Appendix of Appellant No. 7604, p. 97) regarding the construction of the bascule spans to raise to 71 degrees, instead of 82 degrees as required by the plans approved by the Secretary of War, when he said that he would make such construction without regard to whether prior approval had been obtained and "wait for

the War Department to squawk or something that we were not doing right".

Whether one may denominate the drawings attached to the official permit as "sketches" or "plans", they nevertheless constitute the standard by which the bridge must be constructed or else exist without legal sanction. The bridgeowner is required by law to comply with these drawings and may not deviate therefrom. No legality for a structure which deviates from these plans can be implied from the failure of the War Department to "squawk". As said in our Petition, the matter of legality of the protruding gear racks depends entirely on whether the bridgeowner can show that it obtained the affirmative approval of the Secretary of War to construct the bridge with this feature included. Since it clearly appears that the bridgeowner did not represent to the Secretary of War that this particular feature of construction was desired and did not request or receive approval thereof, the conclusion is inevitable that this construction is without legality.

The effort of the Highway Department to justify its failure to obtain official sanction as required by statute for the construction of this feature of its bridge is by way of testimony of some employees of the District office to the effect that in their personal opinions the protrusion of such construction would not be considered as affecting navigation in the Ashley River. Although these witnesses agreed that there was no way for them to tell from the plans submitted by the applicant that the bridge to be constructed would have protruding gear racks, they thought that if such feature had been shown it would not have been regarded as an objectionable construction since contact with passing vessels could be avoided by fendering, but they conceded that approval of such conditions was a matter of judgment for the Secretary of War to determine.

The evidence submitted at the hearing in July, 1959, establishes that the War Department is very much concerned with many structural elements outside of the red lines. It is true, of course, that the primary concern of the War Department is that there shall be available for navigation a clear width, sufficient to meet the needs of navigation, but, in addition to this primary objective, it is equally important that ships passing through the opening shall do so in safety. (Appellants' Appendix, No. 8023, pp. 38, 39, 45, 46, 90, 91, 92, 95, 126). The provisions of the application for a permit clearly indicate the concern of the War Department with the essential features of the structure in the area of the navigational opening, since it is required that there be shown upon the plans submitted with the application the "position of piers, abutments, fenders," all of which are outside of the red lines. (Petition, p. 25a-F). It is implicit that by requiring a showing upon the plans of "those features which affect navigation" the War Department intends that there appear upon the plans whatever may constitute a hazard to the safe passage of vessels, whether within or without the red lines. (Appellants' Appendix, No. 8023, pp. 90, 95).

In this connection, Mr. Paul Snell, a Civil Engineer with 38 years of service in the Corps of Engineers, 22 years of which he headed the Permit department in a District office, expressed the view that the protruding gear feature was "hazardous to navigation" and should have been shown by the applicant on the plan submitted for approval so that the permit could either eliminate the hazard or prescribe the protection needed in respect to this potential hazard (Appellants' Appendix No. 8023, pp. 90, 92, 93, 94, 97). Regardless of whether this feature is viewed as hazardous or non-hazardous, the fact remains that it was not approved in the manner prescribed by statute and so, by the very terms of the statute, exists illegally.

The Highway Department urges that the bridge as built "faithfully implemented the permit," and cites the testimony of its design engineer witness Barstow to the effect that the contract and shop drawings made for the use of constructors of the bridge, and the construction itself, faithfully implemented the permit plans. This is so obviously contrary to fact that it hardly needs comment. The evidence is that the contract drawings provided for the raising of the bascule spans to no more than 79° 30′ and that the actual construction allowed the spans to be raised to no more than 71 degrees, whereas the permit requirements were that they be raised to 82 degrees. Not only did this variation from the permit requirements not permit the spans to be raised to the proper angle but it effectively narrowed the navigational opening to 107.3 feet as compared with the permit requirement for a clear opening of 136 feet, and obstructed the draw by overhanging the fenders by approximately 14 feet on each side. Furthermore, the contract and shop drawings showed that the gears would protrude beyond the abutment, which is a distinct variation from what is shown upon the approved plans.

If the Army Engineers made the periodic inspections of the bridge during the period of construction that the Highway Department would have this Court believe, it seems strange that no one appears to have been aware of the deviation from the permit in respect to the raising of the spans or the protrusion of the gear racks. There is no evidence of the awareness by any inspector or engineer employed by the War Department of these features of construction or of the numerous variations from the requirements of the permit, and the certification by the District Engineer to the Secretary of War, after completion of the bridge, that there had been compliance with the permit was contrary to fact, and is of no avail.

As the Court observed in the similar case of *United States* v. *Norfolk-Berkeley Bridge Corp.*, 29 F. 2d 115, 122, where a United States vessel collided with some overhanging gear racks while passing through the draw of a bridge:

> The bridge corporation does not deny that there was an overhang of the gear racks when the bridge was built in 1916, but it takes the position that this construction was approved in effect by the Secretary of War. *** The district engineer and other subordinates of the War Department had no authority to authorize a modification of the plans attached to the permit. The terms of the General Bridge Act are clear that this authority is vested in the Secretary of War and Chief of Engineers. *** If by oversight or otherwise a material departure from the general plan is approved by the district engineer or his assistants, the responsibility of the bridge owner is in no way affected.
>
> The bridge corporation further argues that certain letters which passed between its engineer and the district engineer during the early part of 1924 prove that the bridge was constructed in 1916 in accordance with the permit. The engineer of the bridge on February 1, 1924, wrote the district engineer and *** requested a statement from the War Department on the point. To this letter the district engineer replied (as was the fact) that on January 10, 1924 he had reported to the Chief of Engineers that the bridge had been completed in accordance with the approved plans. This correspondence, however, is not conclusive. In indicates quite clearly the opinion of the district engineer, *but this is of no avail since*, as has been shown, *it is not in accordance with the facts*. (Emphasis added)

If the existence of the gear rack constituted a statutory violation and if the collision of the vessel with it was the proximate cause of the damages. then the bridgeowner is at equal fault regardless of whether there was negligence in the navigation of the vessel. *The Pennsylvania v. Troop*, supra.

3. The fendering system was inadequate in design, construction and maintenance.

The Highway Department argues that the fender system was adequate as designed, constructed and maintained. The adequacy contended for is to keep a passing vessel from striking the concrete abutment. It is said that the fender system was intended to do no more than this and since, in fact, it did keep the ship from scraping the abutment, it accomplished its purposes.

The argument of the Highway Department is strangely silent with respect to the adequacy of the fendering system to fend a ship from striking the gear rack which protruded from the abutment and from collision with the overhanging bascule span. We agree that the fender did keep the ship from striking the concrete abutment, but that was only one portion of the bridge structure at the draw opening. We contend that the inadequacy of the fendering system is established by reason of the fact that it was not designed, constructed and maintained to hold a ship off of all the structure at the draw opening, and particularly those portions of the structure (i.e., the protruding gears and the overhanging span) which were erected without permission of the statutory authority.

The design, construction and maintenance of the fenders, being limited to protection of the concrete abutment alone, emphasizes what we have previously argued in this brief.

That is to say, the expert opinion is that the construction with protruding gear racks would or would not constitute a hazard to navigation, depending upon the adequacy of the fendering system which protected it, and that hence the intended construction should have been made known to the authority whose permission was required for building the bridge. If the protrusion of the gears had been made known to the Secretary of War, he might well have prescribed in the permit that there either be no protrusion or what fendering would be necessary to eliminate the hazard. Instead, the Highway Department withheld from the Secretary of War the information that he should have had in respect to the intended construction of the protruding gear rack and then designed and constructed a fendering system which did not fend against this hazard.

In respect to the maintenance of the fenders, as we stated in our Petition, the uncontradicted testimony was that the pilings were in a state of almost complete deterioration with comparatively few not completely broken off. It is said by the Highway Department that the witness Rudd, a diver, stated that he found pilings to be good, whole pilings, unbroken from the waterline down into the mud. This witness was concerned only with underwater damage in respect to the piles and gave no testimony as to the damage between the high and low water mark, which is always the area principally affected by marine life. We believe that a photograph designated "E" in the Appendix to the Petition demonstrates irrefutably the condition of the piling above the low-water line. (Defendants' Exhibit D-I, No. 3)

The Highway Department claims that the testimony of Col. L. S. LeTellier was to the effect that had the fender not served its purpose "the terrific impact of the FORT FET-

TERMAN might very well have destroyed the concrete abutment of the bridge, since the FORT FETTERMAN, because of her size and speed at the time of the impact, was exerting a potential energy in the neighborhood of sixty million foot-pounds" (Brief in opposition to Petition, pp. 24, 25). In point of fact, neither Col. LeTellier nor any other witness attempted to give the force of the impact between the hull of the vessel and the gear rack. Col. LeTellier did state that a ship of over 10,000 tons dead weight, "if it were moving at, say, eight knots," would exert "a potential energy there of sixty—around sixty million foot-pounds", but went on to say that "if it were scraping into the fender—I don't know what—I don't know what the force of that reached—but it could develop a component against those piles the magnitude of which —I don't know". (Appellees' Appendix, No. 7604, p. 227).

Obviously the assertion by this witness with respect to the energy exerted of sixty million foot-pounds refers to a headon collision between the vessel and some fixed object and has no reference to the scraping force exerted by reason of a breasting action between the hull and the fenders such as did occur. Incidentally, it is interesting to note that the Highway Department always assumes and asserts a terrific blow between the hull of the vessel and the gear rack which resulted from the scraping action, while at the same time it assumes and asserts that there was a light blow from the ship's superstructure upon the overhanging span although this collision was headon. (Defendants' Exhibits DX-4, 5, and 2, appearing as photographs "A", "B" and "C" in back of this reply brief).

In regard to our contention that the number of pilings provided in the fender system was substantially less than those shown to be required by the permit, the Highway Depart-

ment states that the number of piling depicted upon the approved plans was no more than "symbolic". We do not know how it arrives at such a conclusion except that the chief bridge engineer of the Highway Department testified that when a socalled "sketch" is made up to go with an application for construction of a bridge the Highway Department does not intend that it should be tied down to any specific number of pilings. (Appellee's Appendix, No. 7604, p. 285). Be that as it may, the plans approved by the Secretary of War, whether conceived by the Highway Department to have any significance, did depict and define the number of pilings for the fendering system, and a far lesser number than prescribed by the approved plans existed at the time of this collision. As the Court held in the *Norfolk-Berkeley Bridge* case, improper maintenance is as much a deviation from the permit as improper construction. *United States* v. *Norfolk-Berkeley Bridge Corp.*, 29 F 2d 115.

4. The failure promptly to open the draw upon signal caused the ship to lose the momentum necessary for maneuverability.

The Highway Department contends that the draw was opened in ample time to permit the ship to pass through the opening. While, of course, the draw was opened before the ship attempted the transit of the opening, she had then lost the momentum which was needed for proper maneuverability. The Highway Department makes no attempt to refute the testimony of those in charge of the vessel on this subject.

It was testified by the third mate that the ship blew for the bridge to open for the first time at approximately 0920, for the second time at 0927, and for the third time at 0933 (Appellants' Appendix No. 7604, pp. 137, 138, 139). The entries in the bell book of the vessel show the various speeds

of the vessel's engine from the time when the ship first blew to the time of the collision as follows (Appendix of Appellants No. 7604, p. 102):

> . . . 0918 half ahead. 0923 slow ahead. 0927 stop. 0931½ dead slow ahead. 0933 stop. 0933⅝ slow ahead. 0936 half ahead. 0937¼ full ahead. 0939 port side struck bridge. 0939⅝ stop.

As stated in our Petition, the loss of momentum brought about by having to slow the forward speed of the vessel on its approach to the bridge opening impaired its maneuverability and undoubtedly contributed to the collision. There is no refutation of the evidence bearing on this subject and we believe that it is inescapable that the bridgeowner should be held at fault for its statutory violation in failing to open the bridge promptly upon signal and in failing to give any responsive signal. (33 C.F.R., Sec. 203-210)

CONCLUSION

For all of the reasons mentioned by us in our Petition, as well as the reasons here discussed, we respectfully submit that the Petition for writ of certiorari should be granted.

Respectfully submitted

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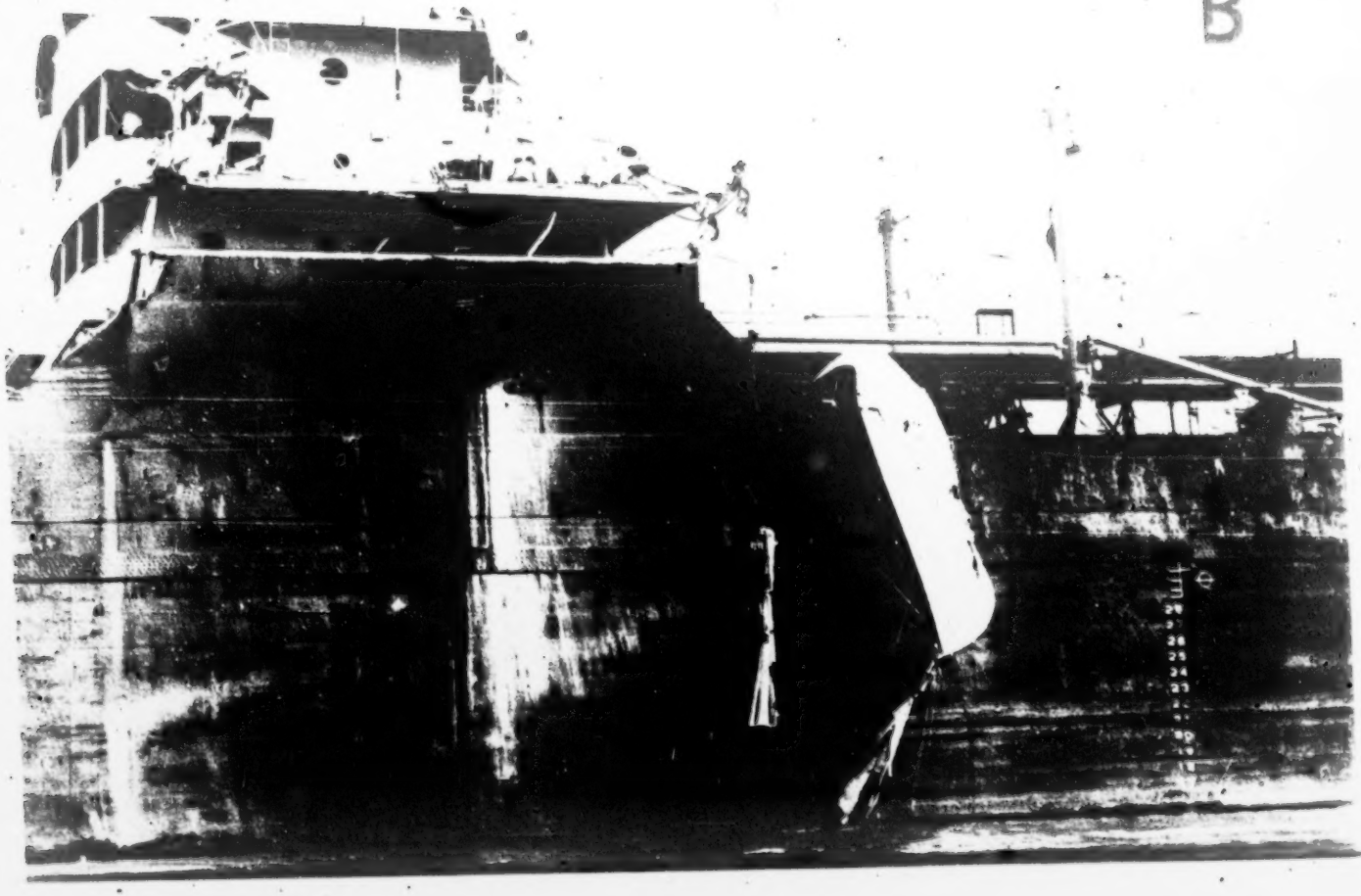
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